Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

PETITIONER,

V.

TIMOTHY JOHN YELDER,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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35pp

QUESTIONS PRESENTED

1. May an appellate court reverse a trial court's decisions overruling objections under Batson v. Kentucky, 476 U.S. 79 (1986), to the exercise of peremptory strikes under the applicable "clearly erroneous" standard based upon a conclusion from isolated portions of the voir dire transcript that one but not all of a prosecutor's stated reasons for two of those strikes was not credible?

2. May an appellate court reverse a trial court's decisions overruling objections under Batson v. Kentucky to the exercise of peremptory strikes under the applicable "clearly erroneous" standard based upon a view that some (but not all) of the racially neutral reasons for some of the strikes were inherently suspect or otherwise not legitimate?

THE PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The opinion of the Court of Criminal Appeals of Alabama affirming the Respondent's convictions and the decision of that court denying rehearing are not yet reported and are reproduced at pages 17-79 of the appendix hereto.

2. The opinion of the Supreme Court of Alabama reversing the Respondent's convictions and the decision of that court denying rehearing are not yet reported and are reproduced at pages 1-16 and 80-81 of the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Alabama which is sought to be reviewed was entered on August 14, 1992. The order of the Supreme Court of Alabama denying rehearing was entered on October 8, 1993, and this petition is filed within ninety days of said date.

This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

> No state shall ... deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. Amend. XIV, §1

STATEMENT OF THE CASE

The Respondent, Timothy John Yelder, was charged with three counts of first degree rape, one court of first degree burglary, two counts of second degree burglary, and one count of first degree sodomy. These charges were consolidated for trial, and Yelder was found guilty on all counts. (R. 1137-1138, 1179-1205, 1251) Yelder was sentenced to life in prison on each count of rape, 40 years' imprisonment for the sodomy conviction, 20 years' imprisonment on each second degree burglary conviction, and 30 years'

imprisonment for the first degree burglary conviction. (R. 1152-1156)

Each of the three victims' faces was covered during the attack, and none of the victims could identify Yelder. Thus, DNA evidence connecting Yelder with each of the rapes was critical to the State's case. (Appendix B, pp. 20 and 68; R. 240-241, 244-245, 250, 295-296, 299, 303-304, 370, 378-380) The prosecutors' desire to eliminate veniremembers with communication and comprehension difficulties, due to the complex testimony regarding new scientific test procedures and volumes of technical test data that would be presented, was reflected in the questions the prosecutors submitted for the trial judge to ask the venire on voir dire. (R. 1271-1291) About 15 witnesses testified at trial concerning the taking, transporting, preservation and testing of numerous blood samples, the theory and method of DNA fingerprinting,

and population genetics statistical theories and conclusions. (R. 463-700, 712-1042) This testimony consumed most of the trial and involved numerous exhibits, including a slide presentation on DNA fingerprinting and the use of terms such as immunogenetics and histocompatibility (R. 613), cytogenetics (R. 828), electrophoresis (R. 842), restriction enzyme (R. 935), cross-contamination (R. 937), and Hardy-Weinberg equilibrium theory (R. 1022). The State's voir dire questions included ones directed to the ability to listen with great attention and to follow testimony of an advanced scientific nature (R. 1279-1280, 1287-1288), and others directed to veniremembers with vision problems who had not had their eyes examined in two years or who would be limited in the ability to read and examine charts a distance away or documents with fine print. (R. 1280, 1288)

Another question requested by the State asked whether any veniremembers felt uncomfortable judging another person, indicating that some people take the Bible admonition "Judge not, that ye be judged" literally. (R. 1280-1281, 1289)

There was an extensive voir dire examination of potential jurors. (R. 6-184) After some preliminary questions, the trial judge made this inquiry:

> [H]ave any of you seen anything in the newspapers.... Anybody seen anything in the newspapers, seen anything on the television, or listened to anything on the radio about these charges involving these allegations -- alleged rapes, alleged burglaries, back last spring out in the Brandywine, Woodmere area? Everyone that has seen anything, heard anything or discussed this case, heard it discussed, have any knowledge at all through the media, through discussing it with friends, any other way at all, have any knowledge about the cases involving Timothy Yelder, please raise your hands.

(R. 12-13) After every juror who had responded was taken to another room, the trial judge asked the remaining veniremembers, "Y'all haven't heard anything or seen anything on the T.V.?" (R. 13-14) The following then occurred:

> BY A JUROR: I have a question. My question is, does that mean did you read the paper, did you see this in the paper? Is that what you're saying?
>
> BY THE COURT: No, what I'm asking you, do you know anything about this case whether you got it from the media or whether you got it from anywhere else?
>
> BY A JUROR: My answer to that is no.
>
> BY THE COURT: All right, if you have read anything, seen anything, heard anybody discussed, talk about the charges of Timothy Yelder for rape, about a series of rapes that took place out in the Brandywine area back in the spring of 1988, last spring, I want to know. If you have heard anything --.
>
> BY A JUROR: Yes, excuse me, I have read about it.

BY THE COURT: All right, let her go down to the jury assembly room. I don't know how I can say that much stronger.

BY A JUROR: I saw the headlines in the papers but I didn't really read about it.

BY THE COURT: All right, you go down to the jury room with the rest of them, we'll call you back in a minute.

BY A JUROR: What if during the course of the information that you realize that you have heard it?

BY THE COURT: Maybe you better go down there with them, too.

All right, that was a lot of publicity about a fellow that was charged with doing some raping out in this area last spring, and if you know anything about it, anything at all, newspaper-wise, talking about it, conversation-wise or otherwise, that's what we want to know.

BY A JUROR: I recognize the name because I read the headlines as well.

(R. 14-16)

The record also reflects that the following occurred during the trial judge's questioning of veniremember 75 (Ennis McCorvey):

> Q: What this is about Mr. McCorvey, when somebody has seen something in the paper or knows something about a case, we have to be real careful about it, that's why we are doing it this way. What is it you saw or read or heard or know about this case?
>
> A: I don't know nothing but what I saw in the papers.
>
> BY MS. BROOKS [a prosecutor]: Excuse me, Your Honor, I didn't hear him.
>
> BY THE COURT: He knows nothing except what he saw in the papers?
>
> A: I don't even know anything about it.
>
> BY THE COURT: He don't know the gentleman.
>
> Q: Let me ask you this, this is real important: would anything you saw in the paper or know about this case, would any of that cause you to have an opinion, a fixed opinion as to whether or not this man here is guilty or whether he is not

guilty of this case, of this charge?

A: I have no knowledge of it.

(R. 88)

The record reflects that veniremember 132 (Christine Dunn) gave the following response when individually asked what she knew or had read or saw about the case: "Oh, I had been reading about the case, I had been keeping up with it in the newspaper." (R. 112-113) She then gave yes or no responses to a series of follow-up questions. (R. 113-114)

After the trial judge inquired whether any veniremember knew or had read anything about DNA, he had the 26 jurors who had identify themselves. (R. 176-178) After he began his next question, veniremember 72 (Johnnie Means) interrupted to respond to the preceding question. (R. 178)

The State moved to strike a veniremember for cause who had responded

that he would have problems concentrating on the case. The trial judge denied this motion but then suggested removing this individual by agreement to make the strikes even. Defense counsel objected, stating "You've already let three or four of our blacks go," referring to the excusal of mothers who could not be sequestered. The trial judge then forcefully admonished defense counsel that the case would not be tried on the basis of race and that race had been irrelevant to the excusal of jurors. (R. 186-188)

Before the jury was sworn, defense counsel objected to the jury as constituted "under the authority of Batson vs. Kentucky." (R. 194, 228) In support of this objection, defense counsel stated that Yelder is black, that the State had 32 strikes and had struck 24 blacks, and that, in his opinion, the prosecution team had exercised peremptory challenges to exclude

members of Yelder's race. (R. 194) In response, one of the prosecutors pointed out that two members of the jury were black individuals. (R. 197) The trial judge asked the prosecutors to state their reasons for striking the black jurors in question, expressly not ruling whether a prima facie case had been established. (R. 198, 200)

A summary of some, but not all, of the reasons given for the prosecutors' strikes of black veniremembers is contained in the opinion of the Court of Criminal Appeals. (Appendix B, pp. 38-42)

Prosecutor Bruce Maddox stated a combination of reasons for striking veniremember 151 (Catherine Jackson). She was not on the original juror list so the prosecution did not have as much information on her as it normally had and they had had to do some very quick research, which had revealed convictions

for theft by fraud and for receiving stolen property for an individual with the same name and apparent age. Ms. Jackson had responded that she knew Mr. Wagstaff. Both Mr. Maddox and other prosecutors had noticed her mumbling a great deal to no one in particular during voir dire. He thought her actions indicated hostility to the situation. Mr. Maddox concluded, based on experience and the totality of these circumstances, that Ms. Jackson would not be a good juror for the State, and that the State could not take a chance on her since it had not had the time and information available on her it normally had. (R. 214-215)

Mr. Maddox also stated a combination of reasons for striking veniremember 72 (Johnnie Means). She had sat right in front of him on the front row and he saw her responses very well, including nodding very vigorously when the judge said the

"Judge not, that ye be judged" quote. Ms. Means also had some question about her eyesight in response to the State's question about that. With respect to a couple of questions the State had requested, Ms. Means did not respond when the judge went row by row for responses and had not responded until the judge was about to go on the next question. Her response time was very slow, and Mr. Maddox feared that she would not be favorable to the prosecution and might not be able to deal with the multitude of new scientific information the State would present. Additionally, Mr. Maddox was a little worried by a "We care" pin Ms. Means was wearing of which he did not know the meaning. (R. 217-218)

Mr. Maddox also stated a combination of reasons for striking veniremember 132 (Christine Dunn). She had seemed to have some difficulty in the voir dire before the

court in understanding what the court was saying to her about what she may have heard about the case, and her responses were such, both from articulation and the way she put sentences together, that Mr. Maddox could not understand what she said. Mr. Maddox was concerned about both her ability to perceive what was said and her ability to communicate, particularly on the complicated scientific evidence in the case. He was afraid she could not meaningfully discuss the case with fellow jurors. In addition, she had a record of traffic cases, but this was not of great concern. However, she showed an extreme disinterest in what was going on and Mr. Maddox thought she either would not listen to the evidence or would not be able to understand. She was chewing gum while trying to talk to the court. Mr. Maddox did not believe she would be able to give

the case the attention and consideration it deserved. (R. 222)

Mr. Maddox also gave a combination of reasons for striking veniremember 75 (Ennis McCorvey). Mr. McCorvey was 69 years old and an instance where, due to age or some physical condition, a veniremember had difficulty carrying himself, listening to the court, and responding. He was very hesitant in answering or had difficulty in understanding and speaking. Mr. Maddox did not believe Mr. McCorvey could give the attention to the case that it deserved, and some of the other prosecutors felt he might have a hearing problem. (R. 225-226)

Mr. Maddox struck every veniremember, both black an white, who admitted to hearing problems and everyone who wore glasses and had not had an eye examination in two years, except for one individual (#84, Mr. Byrd) who was struck by the defense. (R. 146, 147, 206, 217, 220,

223-225, 1292) He also struck white veniremembers who were old and frail or who for any reason exhibited a slowness to understand or other potential difficulty understanding the complex scientific evidence the State would present. (R. 220, 223-224, 227) He struck a white female whose husband was a counselor because he felt that counselors are not disposed to punish people and another white female whose husband had been a minister because he felt her strong religious feelings might mitigate against the State. (R. 227-228) The State's last four strikes were of white individuals. (R. 226-227)

The trial judge decided that Mr. Maddox's stated reasons for all the strikes of black persons were racially neutral, and he overruled the defense objection. (R. 228) After Yelder was convicted, a motion for new trial included allegations that the trial court had erred in its application of

Batson v. Kentucky and that the State's strikes indicated a violation of a defendant's constitutional rights as set forth in Batson v. Kentucky. (R. 1337)

At the hearing on the motion for new trial, defense counsel alleged that the prosecutor's stated reasons were pretextual. (Supp. R. III. 6-10) Prosecutor Ellen Brooks responded that the prosecution had struck every individual they were aware of to whom the reasons that had been stated for striking black individuals applied, e.g., chewing gum, appearing elderly or hard of hearing, or having a slow response time. (Supp. R. III. 12) She emphasized that the prosecution had known it would be a long trial with complicated evidence and that the State was very concerned to eliminate those who were physically or mentally unable to listen and comprehend as well as to endure the physical difficulties of a

long, difficult, and emotional trial. (Supp. R. III. 12-13) She also identified each actual juror by number and for each stated that the prosecution notes had not indicated any serious criminal convictions or any difficulty in concentrating or understanding. Three white and one black juror had minor traffic infractions; these were left after the prosecution struck all of those with more serious convictions early on. (Supp. R. III. 47-48)

The trial court overruled the motion for new trial, without opinion. (R. 1352) On appeal, Yelder argued that the trial court had erred in denying his Batson motion and that the prosecutors' reasons for strikes of black jurors were not race neutral. (Appendix B, pp. 35-36) The Court of Criminal Appeals proceeded directly to

evaluating the race-neutrality of those reasons.[1] (Appendix B, pp. 37-46)

The Court of Criminal Appeals concluded that the strikes of black veniremembers were race-neutral. (Appendix B, pp. 42-43) It declined to reverse the trial court's decision on the ultimate question of discriminatory intent, noting that an appellate court could only reverse a trial court's factual finding that challenges were not racially motivated if that finding was clearly erroneous, and relying, in part, on this Court's decision

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[1]In so doing, it mistakenly identified Mr. Wagstaff as an individual involved in victim's rights. (Appendix B, p. 39) Mr. Wagstaff had been a controversial person in public service who had made claims that had put him in the news, and Mr. Maddox had reason to believe that he was present at trial on behalf of the defense. Mr. Maddox struck all three individuals (two black and one white) who said they knew Mr. Wagstaff. (R. 142, 210, 214, 215, 224-225)

in Hernandez v. New York. (Appendix B, p. 47-49) The State applied for rehearing with respect to the misidentification of Mr. Wagstaff. Yelder also applied for rehearing. Both rehearing applications were overruled without opinion on November 15, 1991. (Appendix B, p. 78)

The Alabama Supreme Court granted Yelder's petition for a writ of certiorari to determine whether the prosecution's use of peremptory strikes violated the principles it had set forth in Ex parte Branch, 526 So.2d 609 (Ala. 1987), and Ex parte Bird, 594 So.2d 676 (Ala. 1991).[2]

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[2] In Branch and Bird, the Alabama Supreme Court set forth its understanding of this Court's decision in Batson v. Kentucky, the procedures it believed necessary to implement the Batson decision, and the scope of appellate review of trial courts' decisions on Batson motions. See Branch, 526 So.2d at 616; and Bird, 594 So.2d at 679-685.

(Appendix A, p. 1-2) In its August 14, 1992, decision in Yelder's case, it gave a summary of some, but not all, of the prosecutors' reasons for striking veniremembers 72, 75, 132, and 151. It then stated, following its decision in Bird, that a strong statistical result of strikes case raises a strong inference of discrimination which requires stronger explanations by the State in rebuttal. (Appendix A, pp. 3-7)

The court then labelled various reasons, e.g., same name as an individual prosecuted, body language, and communication difficulty, as "whimsical, ad hoc excuses." Next, the court quoted (with some inaccuracy) two isolated portions of the voir dire transcript where veniremembers 75 and 132 were questioned. Finally, the court stated that the State's allegation of communication deficiencies on the part of these veniremembers was refuted

by said record. On this basis, the court concluded that the State's explanations for its challenges of these veniremembers were a pretext for racial discrimination, and it reversed Yelder's convictions. (Appendix A, pp. 7-8)

The State applied for rehearing, arguing the issues presented in the instant petition. Rehearing was denied by the Alabama Supreme Court on October 8, 1993, without opinion. (Appendix C)

ARGUMENT

THE WRIT SHOULD BE GRANTED DUE TO CONFLICT WITH THE CONTROLLING DECISIONS OF THIS COURT IN BATSON v. KENTUCKY, 476 U.S. 79 (1986), AND HERNANDEZ v. NEW YORK, 111 S.CT. 1859 (1991), AND WITH DECISIONS OF COURTS OF APPEALS.

In Batson v. Kentucky, 476 U.S. 79 (1986), this Court indicated that a prosecutor may not strike potential jurors solely on account of their race or on the

assumption that black jurors as a group are unfit, but that peremptory challenges may be exercised for any other reason related to the prosecutor's view concerning the outcome of the case. Batson, 476 U.S. at 89 and 98. The Court also emphasized that when a prosecutor is required to give an explanation for a strike of a black person, that explanation need not rise to the level justifying a challenge for cause. Batson, 476 U.S. at 97. This Court further stated that a trial court's determination whether there had been intentional discrimination is a finding of fact that largely turns on an evaluation of credibility and, thus, is entitled to great deference by a reviewing court. Batson, 476 U.S. at 98 n.21.

This Court further expounded on evaluation of the race-neutrality of an attorney's explanation of a strike and the standard of review of trial courts' decisions in Hernandez v. New York, 111

S.Ct. 1859 (1991). With regard to the former, this Court stated that a court must "determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." The Court cautioned that proof of racially discriminatory intent is required to show a violation of the Equal Protection Clause, and that racially disproportionate impact alone does not suffice. The Court held that a neutral explanation means an explanation based on something other than the race of the juror. "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Hernandez, 111 S.Ct. at 1866.

This Court also indicated in Hernandez that a prosecutor's decision to strike a

potential juror could be due to a consideration of multiple factors, that in such a case all of those factors must be considered collectively in determining the race-neutrality of the explanation, and that a doubt related to communication abilities based upon an individual's conduct during voir dire is a race-neutral explanation for a strike. In Hernandez, this Court held a prosecutor's explanation that he struck two Spanish speaking jurors because their responses and demeanor during voir dire caused him to doubt their ability to defer to the official translation of Spanish-language testimony to be race-neutral. It refused to consider the correlation between ethnicity and Spanish-language ability in determining the race-neutrality question because the prosecutor had not relied solely on this language ability. Hernandez, 111 S.Ct. at 1866-1867.

With regard to appellate review of a trial court's decision on the ultimate question whether the defendant established purposeful discrimination, this Court held that the trial court's decision could not be overturned unless it was "clearly erroneous." Hernandez, 111 S.Ct. at 1871. The Court's analysis of the standard of review issue began with reference to its declaration in Batson that the trial court's decision represents a finding of fact to be accorded great deference. Hernandez, 111 S.Ct. at 1868-1869. The Court made the following comment in this regard:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding will "largely turn on evaluation of credibility." 476 U.S., at 98, n.21, 106 S.Ct., at 1724, n.21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for

> a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." Wainwright v. Witt, 469 U.S. 412, 428, 105 S.Ct. 844, 854, 83 L.Ed.2d 841 (1985), citing Patton v. Yount, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847 (1984).

Hernandez, 111 S.Ct. at 1869. This Court also stated with regard to a trial court's credibility determination that "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." Hernandez, 111 S.Ct. at 1870.

This Court indicated in Hernandez that a trial court's decision cannot be deemed clearly erroneous where there are two

permissible views of the evidence pertaining to the determination of the prosecutor's sincerity. It noted several factors on which a trial court could validly rely in crediting a prosecutor's explanation. The first such factor is the prosecutor's demeanor, which this Court noted is a matter which an appellate court has no opportunity to review. Hernandez, 111 S.Ct. at 1871-1872.

The decision and opinion of the Alabama Supreme Court in the case at hand is obviously in direct and irreconcilable conflict with this Court's controlling decisions in Batson v. Kentucky and Hernandez v. New York, which decisions the Alabama Supreme Court chose to ignore.

In the first place, the Alabama Supreme Court did not apply the applicable "clearly erroneous" standard of review nor defer in any way to the trial court's judgment on the ultimate question of

discriminatory intent. Instead, it substituted its judgment for that of the trial court as to the sincerity of the prosecutor's explanation that he struck veniremembers 75 and 132 due, in part, to his perception that these individuals had difficulties in understanding and speaking. It made this substitution of judgment based upon a de novo evaluation of two isolated portions of the voir dire transcript. In the Alabama Supreme Court's view, the prosecutor's explanation of "communication difficulties" with regard to these two veniremembers was refuted by those portions of the record and, therefore, this explanation was a pretext for racial discrimination. (Appendix A, pp. 8-13)

The Alabama Supreme Court's opinion that review of a written record can accurately convey the communication abilities of jurors is patently erroneous.

See United States v. Changco, 1 F.3d 837, 841 (9th Cir. 1993). Characteristics such as unusual pauses between words or sentences or when responding to questions, enunciation, voice inflections and facial expressions are not reflected in a written record. They are obvious, however, to all present at trial, including the trial judge, who is the proper fact-finder. The Alabama Supreme Court ignored both this simple and well-recognized fact about review of written records as well as this Court's repeated admonitions in Hernandez as to the importance of the trial court's evaluation of a prosecutor's demeanor as bearing on the prosecutor's sincerity. Hernandez, 111 S.Ct. at 1869 and 1872.

The portions of the transcript on which the Alabama Supreme Court relied were not even brought to the attention of the trial court. Thus, the prosecutor had no opportunity to respond to the view that

these transcript excerpts indicate pretext, nor did the trial court have any opportunity to consider and address this matter. See United States v. Changco, 1 F.3d at 841-842.

If this were not bad enough, a careful reading of the actual transcript excerpt regarding veniremember 75 to which the Alabama Supreme Court referred actually supports the prosecutor's allegation of communication difficulties rather than refuting it.[3] A prosecutor interrupted immediately after this juror's first response and said she did not hear the juror. The trial judge apparently was not confident that he had heard the juror correctly, since there is a question mark at the end of his recitation of the juror's

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[3]The transcript excerpt in question is set forth fully at pages 8-9, supra.

response in reply to the prosecutor's statement. (The question mark is not in the Alabama Supreme Court's opinion but is in the transcript.) The juror then spontaneously changed his first response, which suggests some confusion on his part. The trial judge then again attempted to translate this second statement by the juror, but the judge's statement of what he thought the juror had just said is at variance with the court reporter's version of that statement. The juror's answer to the trial judge's next question was not responsive to the question asked.

The transcript similarly reveals with respect to veniremember 132 that, when asked what she knew about the case or had read or seen about it, she did not respond appropriately with a factual account but instead merely stated that she had been reading about the case in the newspaper. (R. 112-113)

The Alabama Supreme Court also ignored the fact that five veniremembers who are not identified in the transcript had unusual difficulty understanding the trial judge's initial inquiry about pretrial publicity. The pertinent transcript excerpt is set forth at pages 5-7, supra. The identity of these five veniremembers was known to the attorneys and the trial judge, but not to the Alabama Supreme Court.

The record also directly supports the prosecutor's allegation of slow responses by veniremember 72. (R. 176-179) It also reveals that the prosecutor struck three white jurors because of similar doubts about communication difficulties or confusion in answers. (R. 220, 223-224, 227) It additionally demonstrates that the State's last four strikes were of white individuals and that there were two black individuals on the jury. See United States v. Terrazas-Carrasco, 861 F.2d 93, 95 (5th

Cir. 1988); and United States v. Lane, 866 F.2d 103, 106 (4th Cir. 1989). None of these facts were even mentioned by the Alabama Supreme Court. That court undoubtedly did not use the applicable "clearly erroneous" standard in reviewing the trial court's decision in this case.

The Alabama Supreme Court's decision also conflicts with this Court's decision in Hernandez as to the proper evaluation of the race-neutrality of an attorney's explanation for a strike. The court did not even consider whether the reasons proffered violated the Equal Protection Clause as a matter of law, i.e., whether the reasons were facially valid or whether, instead, a discriminatory intent was inherent in those explanations. Hernandez, 111 S.Ct. at 1866. Rather, the court indicated that stronger reasons are required whenever the statistical evidence of discriminatory impact in the particular

case is strong, and it stated that reasons such as demeanor and communication difficulty are "whimsical, ad hoc excuses" which should be rejected. (Appendix A, pp. 7-8)

In Hernandez, this Court expressly approved as legitimate, race-neutral reasons the very same type of explanations for strikes which the Alabama Supreme Court denigrated and rejected in reversing the trial court's decision in this case. Reasons such as communication abilities or an adverse demeanor are inherently racially neutral. As this Court's opinion in Hernandez makes clear, whether such explanations are credible is an entirely different matter from whether they are race-neutral, but the credibility of such or any other explanation is for the trial court to determine, and that determination may not be overturned unless it is clearly erroneous. In the Alabama Supreme Court's

conflicting opinion, however, such explanations are inherently suspicious and may simply be rejected by an appellate court, at least where the appellate court views the "statistics" in the case to be bad.[4]

The Alabama Supreme Court's decision in this case also conflicts with this Court's decision in Hernandez in reversing

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[4]The court's view that such reasons are inherently suspect is apparent from the court's reference to its decision in Ex parte Bird. See Ex parte Bird, 594 So.2d at 685. The court's view that the communication difficulty reason was a "whimsical, ad hoc excuse" in the instant case certainly is contradicted by the record, as related at pages 3-4, 9-10, and 16-18, supra. Also, this Court held in Batson and Hernandez that an attorney may strike a prospective juror for any reason connected with the attorney's view of the outcome of the case other than race. See also United States v. Bentley-Smith, 2 F.3d 1368, 1373-1375 (5th Cir. 1993)(regarding the "shifting burden" framework in Batson being one of production rather than persuasion and regarding review of challenges based on intuitive judgments).

the Respondent's convictions based upon the singling out and rejection of only one of multiple reasons given by the prosecutor for each of the strikes in question.[5]

Veniremember 72 was struck not only due to slow responses during voir dire but also due to concerns about her eyesight. Every veniremember who responded to the eyesight question was struck by the State except one individual who was struck by the defense, and this reason bore a specific relationship to the case given the voluminous documents and the slide presentation involved. This veniremember

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[5]It appears that the court reversed the convictions solely due to its rejection of the "communication difficulty" explanation for the strikes of veniremembers 75 and 132, but it also summarized some of the prosecutors' reasons for striking veniremembers 72 and 151. (Appendix A, pp. 3-5) Therefore, the State will address the additional reasons for striking all four of these veniremembers.

also had nodded vigorously when the trial judge stated the Bible quote "Judge not, that you be not judged", which clearly would be a legitimate concern to any prosecutor. Also, as previously noted, the record affirmatively supports the prosecutor's explanation of a slow response time by this veniremember. See United States v. Bentley-Smith, 2 F.3d at 1375.

The prosecutor explained that he struck veniremember 132 not only due to a perceived difficulty in understanding the trial judge and the prosecutor's inability to understand this individual, but also because this veniremember had shown an extreme disinterest in what was going on during voir dire and had been chewing gum while trying to talk to the trial judge. These also are facially neutral explanations, and they are reasons which intrinsically must be evaluated by the trial judge since he observed what actually

occurred. See United States v. Terrazas-Carrasco, 861 F.2d at 94-95; United States v. Lance, 853 F.2d 1177-1181 (5th Cir. 1988); United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987), cert. denied, 484 U.S. 928 (1987); United States v. Davis, 871 F.2d 71, 72-73 (8th Cir. 1989); and United States v. Changco, 1 F.3d at 840.

The prosecutor was not only concerned about veniremember 75's ability to understand and speak, but also about this individual's physical condition due to age or other infirmity. Some of the other prosecutors also had felt that this veniremember had an unacknowledged hearing impairment. See United States v. Moreno, 878 F.2d 817, 821 (5th Cir. 1989). The prosecutor struck two white veniremembers due to similar concerns about those individuals' condition due to age. (R. 220, 223-224) He also struck the two veniremembers (one white and one black) who

admitted to hearing problems. (R. 146, 206, 223-224)

A number of obviously race-neutral reasons also were articulated for striking veniremember 151. This juror was not on the original juror list and the prosecutor was reluctant to leave someone on the jury that he had not been able to adequately investigate. His quick research had revealed that an individual with the same name and age had two criminal convictions. See United States v. Tindle, 860 F.2d 125, 129 (4th Cir. 1988), cert. denied, 490 U.S. 1114 (1989); and United States v. Terrazas-Carrasco, 861 F.2d at 95 n.1. This juror also had acknowledged knowing Mr. Wagstaff, and the prosecutor had struck all three individuals (two black and one white) who acknowledged knowing this public figure who apparently was present on behalf of the defense. Cf. United States v. Moreno, 878 F.2d at 821. In addition, all of the

prosecutors had noticed this juror mumbling a great deal to no one in particular during voir dire in a manner that indicated hostility to the situation. See United States v. Terrazas-Carrasco, 861 F.2d at 94-95; United States v. Lance, 853 F.2d at 1181; United States v. Vaccaro, 816 F.2d at 457; Barfield v. Orange County, 911 F.2d 644, 648 (11th Cir. 1990), cert. denied, 111 S.Ct. 2263 (1991); and United States v. Forbes, 816 F.2d 1006, 1010-1011 (5th Cir. 1987).

The multiple factors considered by the prosecutor in Hernandez were related to each other rather than being more discrete multiple reasons for the challenged strikes. However, there is no more grounds for singling out just one of a number of reasons for a strike than there is for singling out a factor that contributed to a lone reason for a strike. The Alabama Supreme Court's decision conflicts with

this Court's opinion in Hernandez by reversing convictions due to rejection of a single reason for certain strikes when that reason was not the sole reason for those strikes. Its decision also conflicts with opinions of courts of appeals regarding the evaluation of multiple reasons for strikes. See, e.g., United States v. Lance, 853 F.2d at 1181; United States v. Davis, 871 F.2d at 72-73; United States v. Lane, 866 F.2d at 106; and United States v. Lewis, 837 F.2d 415, 417 n.5 (9th Cir. 1988).

This case requires review by this Court. The Alabama Supreme Court's opinion is, on its face, in direct conflict with the controlling decisions of this Court. As a decision of the highest court of the State of Alabama, however, it will be used as a guide by the lower courts in this state.

The decision also is not an aberration in this state. The Alabama Supreme Court chose to ignore Hernandez and, instead, to follow its earlier, post-Hernandez decision in Ex parte Bird, 594 So.2d 676 (Ala. 1991). Other post-Hernandez cases in which Alabama courts have egregiously erred in the interpretation of this Court's dictates include Roger v. State, 593 So.2d 141 (Ala.Crim.App. 1991)(held, a prima facie case was established because the trial judge failed to inquire and accepted the explanation that two of those stricken had responded on voir dire that they did not want to serve, and the fact that a juror does not want to be on the jury is not a sufficient reason to strike the juror), cert. denied (Ala. 1992); Guthrie v. State, 598 So.2d 1013, 1019-1020 (Ala.Crim.App. 1991)(rejected prosecutor's explanation that he had struck five individuals because they were relatives of individuals

prosecuted by the district attorney's office because the prosecutor did not confirm these relationships on the record during voir dire and one juror later denied the relationship); Bush v. State, 615 So.2d 137, 139-140 (Ala.Crim.App. 1992)(rejected prosecutor's explanation that he had struck two individuals due to their relationship with people involved in criminal activity because the prosecutor had not asked the jurors about this on voir dire and the record contained no other proof that the prosecutor's allegation was true), cert. denied (Ala. 1993); and Walker v. State, 611 So.2d 1133, 1139-1143 (Ala.Crim.App. 1992)(the truth of virtually any reason proffered by the prosecutor must be verified by voir dire examination of the veniremember, including the actual existence of any suspected biases), cert. denied (Ala. 1993).

Even cases in which a trial court's decision overruling a Batson objection has been upheld exhibit an erroneous understanding of the process of evaluating Batson issues and/or the appropriate standard of appellate review. See, e.g., Bell v. Lowery, 619 So.2d 1380, 1382 (Ala. 1993)(indicating that a prosecutor's explanations must be sufficiently strong to overcome a presumption of bias); McGee v. State, 594 So.2d 219, 222 (Ala.Crim.App. 1991)(rejecting reasons which are not affirmatively verified by the record and accepting a reason only because the prosecutor struck both black and white persons for that reason), cert. denied (Ala. 1992); Christianson v. State, 601 So.2d 512, 516 (Ala.Crim.App. 1992)(indicating that the State's reasons are to be subjected to exacting scrutiny on appeal where the appellant made a strong prima facie showing); Hart v. State, 612

So.2d 520, 524 (Ala.Crim.App. 1992)(reason upheld as race neutral only because the record established that the reason also was applied to white veniremembers), aff'd, 612 So.2d 536 (Ala. 1992); Granville v. State, 624 So.2d 671, 674 (Ala.Crim.App. 1992)(any reasons based even partially on subjective judgments are suspect), cert. denied (Ala. 1993); and Powell v. State, 608 So.2d 411, 413 (Ala.Crim.App. 1992)(rejecting nursing profession as not race-neutral reason because the juror was not questioned on voir dire as to whether she actually was a sympathetic person), cert. denied (Ala. 1992).

The Alabama Supreme Court's sensitivity to racial issues and its desire to eradicate racial prejudice in the jury selection process is laudable. However, the court obviously is mistaken in thinking that it is correctly following this Court's precepts and the requirements of the United

States Constitution. It stands in need of correction and of further guidance by this Court.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari to the Alabama Supreme Court should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
93-TT09 JAN 6 1994

NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

PETITIONER,

V.

TIMOTHY JOHN YELDER,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

APPENDIX TO THE PETITION

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APPENDIX A

[STAMP] RELEASED AUG. 14, 1992

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1992

1910345

Ex parte Timothy John Yelder

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(RE: Timothy John Yelder
v.
State)

(Montgomery Circuit Court, CC 88-2106)

ADAMS, JUSTICE.

Timothy John Yelder petitioned this Court for a writ of certiorari to review a judgment of the Court of Criminal Appeals affirming his convictions of burglary, sodomy, and rape. We granted the petition in order to determine whether the prosecution's use of peremptory strikes to eliminate potential black jurors from the jury venire violated the principles set forth

by this Court in Ex parte Branch, 526 So.2d 609 (Ala. 1987), and Ex parte Bird, 594 So.2d 676 (Ala. 1991), guaranteeing the constitutional right to an impartial trial. We reverse and remand.

In the trial of this case, the prosecution used 24 of its 32 peremptory strikes to remove 24 of the 27 black veniremembers. Following the defendant's timely objection to the racial composition of the prospective jury panel, the prosecution offered various explanations for the prosecution's strikes. A summary of some of those explanations, as set forth in Yelder v. State, [Ms. 3 Div. 212, Oct. 11, 1991] ___ So.2d ___ (Ala. Cr. App. 1991), and as supplemented by the defendant pursuant to Ala. R. App. P. 39(k), follows:

"[VENIREMEMBER NUMBER 72] She was having some question about her eyesight in response to the question we asked about that, and, in addition to a couple of questions we asked, where the judge went row by row asking if she had a response, she didn't respond the first time, and toward the end when you were about to go on to the next question, she finally had a response. Her response time was very slow, I was afraid she would not be favorable to us, and might not be able to deal with the multitude and volume of the information that we intend to offer, much of which is new in this case, particularly, the [evidence of a] scientific nature. She also had on a pin that said 'We care.' I really, really wasn't sure what that meant, but it worried me a little bit.

"[VENIREMEMBER NUMBER 75] I don't know whether it was his age [69] in and of itself, or some physical condition he has, but he seemed to have difficulty carrying himself and listening to the court and responding to what the court said to him. He was very hesitant in answering, or he had difficulty in understanding -- both understanding and speaking. I couldn't tell whether he had a hearing

problem or not, but I had notes to that effect, and I didn't believe he could give the attention to this case that it deserves.

"[VENIREMEMBER NUMBER 132] Number 132 ... seemed to have some difficulty understanding what the court was saying to her about the matters she may or may not have heard regarding the case, and her responses to the court were of such, that both from the way she said things, and the way she put her sentences together, her articulation, I couldn't understand a word she said, and I was concerned both about her ability to perceive what was being said to her, and her ability to mentally communicate with other jurors, particularly on complicated matters such as we are going to have evidence in this case regarding the scientific evidence. I was afraid she could not meaningfully discuss the case with her fellow jurors. Additionally, she ... seemed to show either an extreme disinterest in what was going on, such that she would not listen to the evidence, or an extreme inability to listen and understand what was going on. She chewed gun while she was standing there trying to talk to the court, and I just didn't believe that she would

be able to give to this case the attention and consideration that it deserved.

"[VENIREMEMBER NUMBER 151] We did not have as much information on her as we normally have, and we had to do some very quick research and guessing at her age and so forth. We found that there is a criminal record on [a person having the same name] of a similar age range ... for fraud and receiving stolen property in another county. She indicated during voir dire that she knew Mr. Wagstaff. On that question, ... she seemed to mumble a great deal in the voir dire. I noted she sat about four or five rows back, and I could see ... that she was mumbling during the voir dire, directing her comments to no particular person. Her actions indicated some hostility, I think, toward the situation. I'm not sure exactly how that was directed. I do, based on my experience, have an opinion, but I did not believe, based on the totality of those circumstances that she would be a very good juror for the state."

(Emphasis added.)

In many respects, this case bears a remarkable resemblance to Ex

parte Bird, 594 So. 2d 676 (Ala. 1991). First, the statistics are strikingly similar. In Bird, although "black veniremembers comprised 36% of the venire," the percentage of black jurors actually seated on the jury represented "only 8% of the trial jury." Id. at 680. The State, in that case, "used 85% of [its] peremptory challenges, that is, 17 of 20 strikes, to eliminate 89% of the black veniremembers." Id. at 681. In this case, the jury pool contained a total of 86 veniremembers of which only 27, that is, 31%, were black. The State then used 75% of its peremptory challenges -- 24 of 32

strikes -- to reduce that 31% by another 89%.[1]

As we pointed out in Bird, the sheer weight of statistics such as these raises a strong inference of racial discrimination requiring clear and cogent explanations by the State in rebuttal. Id. at 680-81. Instead of such explanations, however, those proffered in this case virtually parallel the whimsical, ad hoc excuses we rejected in Bird -- in particular, the State's explanations for its challenges of veniremember number 26 (same name as someone allegedly prosecuted by the district attorney's office), id. at 682-83;

---

[1]Ultimately, two black veniremembers were seated on the jury.

veniremember number 76 (excluded because of prosecutrix's "gut reaction"), id. at 684; veniremember number 96 (excluded because of "body language"), id. at 685; and veniremember number 33 (alleged "communication difficulty"). Id.

Moreover, the "articulation" or "communication" difficulties cited by the State as reasons for its challenges of veniremember number 75 and number 132 are not supported by the record. Specifically, the trial court's voir dire of veniremember number 75 elicited the following responses:

> "Q. [By the Court] Your name, please?
>
> "A. E.J. McCorvey.
>
> "Q. What this is about, Mr. McCorvey, when somebody has seen something in the paper or knows something about a case, we have to be real careful about it, that's why we are

doing it this way. What is it you saw, or read, or heard, or know about this case?

"A. I don't know nothing but what I saw in the papers.

> "[Interjection by the prosecution] Excuse me, your Honor, I didn't hear him.
>
> "[The Court] He knows nothing except what he saw in the papers.

"A. I don't even know anything about it.

> "[The Court] He doesn't know the gentleman.

"Q. Let me ask you this, this is real important. Would anything you saw in the paper or know about this case, would any of that cause you to have an opinion, a fixed opinion as to whether or not this man, here, is guilty or whether he is not guilty of this ... charge?

"A. I have no knowledge of it.

"Q. Would you be able to give Mr. Yelder and the State, would you be able to give both of them a fair trial based strictly and based entirely on what comes from that witness stand?

"A. I would.

"[The Court] Anything further?

"[The prosecution] No, sir.

"[The defense] No, sir.

"[The Court] Thank you, sir. Next juror."

Veniremember number 132 responded similarly to the court's voir dire:

"Q. [By the Court] Your name, please?

"A. Christine Dunn.

"Q. What this is about, Mrs. Dunn, the law says that when somebody has seen something about the case in the papers, we need to be real careful about that, that's why we are handling this in this way. What is it that you know about the case, or have read about it, or saw about it?

"A. Oh, I had been reading about the case, I had been keeping up with it in the newspaper.

"Q. All right. Let me ask you this. Would anything that you have seen about the case or read about the case cause you to have a fixed opinion as

to whether or not Mr. Yelder, here, is guilty or innocent of these charges?

"A. No.

"Q. Would you be able to try the case based strictly and entirely on what comes from that witness stand, and not based on anything you may or may not have seen in the press?

"A. Yes.

"Q. Have you got any problems in rendering a verdict to be fair to the State and fair to Mr. Yelder?

"A. No.

"Q. If they proved to you beyond a reasonable doubt that he is guilty, would you have any problem finding him guilty?

"A. No.

"[The Court] Anything further?

"[The prosecution] No, sir.

"[The defense] Ask her if there was a reasonable doubt, would she have any problem finding him not guilty?

"Q. If there was a reasonable doubt as to his innocence, I

mean to his guilt, would you have any problem finding him not guilty?

"A. No.

"[The Court] Thank you. Next juror."

Obviously, the State's allegations of communication deficiencies on the part of these veniremembers are not only wholly without support in the record, but are directly refuted by it. Perhaps most cogently, the record, which reveals a series of clear and unequivocal responses given by veniremember number 132, forcefully contradicts the prosecution's assertions that he "couldn't understand a word she said," because of "the way she put her sentences together." We are compelled to conclude that the explanations advanced by the State for its

challenges of these veniremembers represent no more than a pretext for racial discrimination.

We regret that the conduct of the prosecution has, because of actions taken on the basis of race, once again necessitated a retrial, thus creating an additional strain on the judicial and economic resources of this state. At the present time, "blacks are serving in substantial numbers as jurors and meting out stiff sentences, including death. This is because, although in some instances blacks may be the perpetrators of crime, in even more substantial numbers, they are the victims of crime." Beck v. State, 396 So. 2d 645, 665 (Ala. 1980) (Adams, J., concurring specially). Consequently, we look forward to the eventual demise of

the notion that blacks possess an inherent bias in favor of defendants. In the instant case, however, the judgment of the Court of Criminal Appeals is reversed and the cause is remanded with directions to remand to the trial court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

Hornsby, C.J., and Maddox, Shores, and Ingram, JJ., concur.

Houston, J., dissents

Ex parte Yelder

HOUSTON, JUSTICE (dissenting).

I concurred in part and concurred in the result in part in Ex parte Bird, 594 So.2d 676 (Ala. 1991). In the present case, I agree with Judge Taylor and all of the other Judges on the Alabama Court of

Criminal Appeals, in the statement that "after a careful review of the reasons given by the prosecution for striking both black prospective jurors and white prospective jurors, we conclude that the strikes of black venire-members were race-neutral.". Yelder v. State, [Ms. 3 Div. 212, Oct. 11, 1991] ___ So.2d ___ (Ala. Crim. App. 1991).

APPENDIX B

[STAMP] RELEASED, OCT. 11, 1991
CLERK, ALA. COURT OF CRIMINAL APPEALS

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1991-92

3 Div. 212

Timothy John Yelder

v.

State

Appeal from Montgomery Circuit Court -
(CC-88-2106-PH through 88-2112-PH)

TAYLOR, JUDGE

The appellant, Timothy John Yelder, was charged in separate indictments with three counts of rape, one count of sodomy, two counts of burglary in the second degree, and one count of burglary in the third degree. These charges were consolidated for trial, and the appellant was found guilty on all counts. The appellant

was sentenced to life in prison on each count of rape, 40 years' imprisonment for the sodomy conviction, 20 years' imprisonment on each burglary in the second degree conviction, and 30 years' imprisonment on the conviction for burglary in the first degree.

The appellant was indicted in 1988 and was convicted in 1989. The appellant, in his brief, applies the new rules of criminal procedure in presenting his arguments. However, these new rules do not apply in his case. As stated in Rule 1.5, A.R.Crim.P.: "These rules shall govern all criminal proceedings commenced at or after 12:01 a.m., January 1, 1991." The commencement of criminal proceedings is defined in the committee comments as "the date of the accusatory instrument by which the case was initiated or 'commenced.' "

Proceedings against the appellant were commenced prior to January 1, 1991. For purposes of the present appeal, the Alabama Rules of Criminal Procedure, Temporary govern the appellant's cause.

The state's evidence indicated that the first victim was raped on the night of March 19, 1988. She was in her home, around midnight, asleep in the living room, when she was awakened by the door to the room being kicked open. The individual who entered ran over to her, knocked her glasses off, and grabbed her from behind. The victim screamed and her attacker told her that if she continued to scream he would kill her. The victim tried to get away and ran towards the bedroom. Her attacker followed her, pushed her to the floor, applied a lubricant to her vaginal area, and raped her.

The next rape occurred around midnight on April 28, 1988. The second victim was at a friend's home by herself, asleep in the den, when she was awakened by something being placed over her face. The something was the bathrobe that she was wearing. Her attacker asked her what she was doing there and the victim told him that she was watching the house for a friend. The victim then told her assailant about items in the house which he could take if he would leave. The victim and her attacker walked towards the bedroom. Once in the bedroom, the intruder started pulling off the victim's pants. A struggle ensued, and the intruder sat on top of the victim and forced her to have oral sex with him and then raped her.

The next rape occurred on May 22, 1988. The third victim was at her

father's house asleep in front of the television when she was awakened by something being placed over her face. The intruder had placed her bathrobe over her face. He told her not to make any noise and then proceeded to rape her.

None of the victims could identify the appellant from a lineup. Samples of semen collected from the three victims were tested using DNA matching. These tests connected the appellant to all three rapes.

I.

First, the appellant argues that the trial court erred in allowing the consolidation of the seven counts so that they could be tried in one proceeding. The appellant was charged with three counts of rape, one count of sodomy, two counts of burglary in the second degree, and one count of

burglary in the first degree. The appellant contends that these offenses should not have been consolidated for purposes of trial because, he argues, there is no indication that the assailant was the same individual. He further contends that he was prejudiced as a result of the consolidation.

Consolidation of separate indictments, so that the accused may be tried in one trial is specifically provided for in Rule 15.3, A.R.Crim.P.Temp. (now Rule 13.3, A.R.Crim.P). This rule states:

> "(b) Consolidation. If a defendant has been charged in separate indictments, informations, or complaints, the court, on its own initiative or on motion of either party, may, not later than seven days prior to trial, order that the charges be tried together if the offenses could have been joined in a single indictment, information, or complaint...."

"....

"(d) Severance Grounds. If the court finds that by a joinder of offenses in an indictment, information, or complaint, or by consolidation for trial, as provided in this rule, a defendant or the state may be prejudiced to the extent that a fair trial cannot be afforded, the court shall order an election or separate trials of counts or charges or provide whatever other relief justice may require...."

Consolidation of offenses is favored since it serves the important policy of:

" '...trial convenience and economy of judicial and prosecutorial resources -- considerations of particular weight when the Government and the courts have been placed under strict mandate to expedite criminal trials.' Moreover, 'the defendant may prefer the disadvantages of joinder to the harassment, delay, trauma, and expense of multiple prosecutions.' Disposal of all of the charges in a single prosecution may facilitate concurrent sentencing, and will avoid the possibility of the convicted

> defendant later being disadvantaged by having a detainer filed against him for offenses not tried."

LaFave and Israel, 2 Criminal Procedure §17.1(b) (1984). See also Langham v. State, 494 So.2d 910 (Ala.Cr.App. 1986). There are opponents to the practice of consolidating offenses, see 74 Yale L.J. 553 (1965), and at least one state prohibits consolidation, see Gray v. State, 549 So.2d 1316 (Miss. 1989).

In Alabama, joinder of offenses is permitted if the offenses 1) share the same or similar characteristics, or 2) involve the same conduct or connection in their commission, or 3) are part of a common scheme. See Rule 15.3(a), A.R.Crim.P. Temp. (now Rule 13.3(a), A.R.Crim.P.). See also Butler v. State, 439 So.2d 210 (Ala.Cr.App. 1983). "Joinder, and thus

consolidation, is appropriate where the crimes are of similar character, meaning nearly corresponding, resembling in many respects, or having a general likeness. United States v. Werner, 620 F.2d 922, 926 (2d Cir. 1980)." Ex parte Hinton, 548 So.2d 562, 566 (Ala. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989). The question is whether the offenses are of a same or similar character so that a person evaluating the crimes would believe that the offenses were committed by the same person. See King v. State, 518 So.2d 880 (Ala.Cr.App. 1987). Perhaps the most important consideration is the answer to the following question: If the offense were tried separately, would evidence of each offense be admissible in the trial for the other offense? See Nickerson v. State, 523

So.2d 504 (Ala.Cr.App. 1987); King, supra.

In King two charges of rape and two charges of burglary were consolidated for trial. This court upheld the consolidation, stating:

> "We base this holding upon our finding of the concurrence of the following common features: (1) The assaults occurred within the immediate vicinity of each other and of [the appellant's] residence, all within three minutes' walking distance; (2) they occurred in the late-night hours and six weeks apart; (3) the victims were black females, who lived with only a child and no spouse; (4) the assailant continuously attempted to strangle each woman and threatened to kill each; (5) he warned of inflicting harm to each victim with a weapon; (6) in each incident, light bulbs were unscrewed at the residence; (7) the assailant of both women wore high top tennis shoes; (8) each victim gave the same physical description of her attacker; and (9) each victim was repeatedly adamant that [the appellant] was her assailant."

King, 518 So.2d at 886.

In the instant cause, the offenses with which the appellant was charged shared similar characteristics. The instances all involved white females between the ages of 20 and 33. The offenses occurred within the same general area, within walking distance from each other, and within a nine-week period. Two occurred on the same street. In each instance the females were not married, and the assailant entered their houses from the rear. Each home had a privacy fence in the backyard where their assailants had gained entrance. Each offense occurred around midnight, and the assailant approached each victim from behind and tried to keep his victims from seeing his face by covering the victims' faces with articles of clothing that they were

wearing. The victims all sustained minor injuries, and in each instance their attacker told them that he would kill them if they screamed. Each victim also stated that the male had a distinct voice and that he enunciated his words clearly. The victims each described their attacker as being slim, being between 5'7" and 6'0," and wearing jeans and white tennis shoes. None of the three victims heard a car leave after she was raped. In each instance it also appeared from the conversation with their assailant, that he had been watching them before he broke into their houses. The circuit court did not err in ruling that the offenses were correctly consolidated because they shared the "same or similar characteristics." Rule 15.3(A), A.R.Crim.P.Temp.

Furthermore, the appellant has failed to show that he was sufficiently prejudiced by the consolidation of the offenses. The Alabama Supreme Court in Ex parte Hinton, supra, upheld the consolidation of capital offenses, noting that the appellant had failed to show he suffered "compelling" prejudice. As the Court stated:

> "It is only the most compelling prejudice that will be sufficient to show the court abused its discretion in not granting a severance. A mere showing of some prejudice is not enough. [The appellant] can show no prejudice here, because the evidence of both crimes could have been presented with or without consolidation. No prejudice results where, as here, the jury could easily have kept separate the evidence of the separate crimes."

Hinton, 548 So.2d at 566 (citations omitted).

Because the offenses shared sufficient similarities and because the

appellant has failed to show sufficient prejudice, no error occurred in the consolidation of the seven offenses for trial.

II.

The appellant next contends that the trial court erred in denying his motion for change of venue because the extensive pretrial publicity resulted in his being denied a fair and impartial trial. The Supreme Court of the United States has held that if an impartial jury cannot be selected from the district where the crime occurred, then the court should transfer the case to another district where the jurors are free from bias. Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). In Groppi v. Wisconsin, 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971), the United States Supreme Court held that any law

that prevents an individual from seeking a change of venue, when circumstances have occurred which would effect his right to a fair and impartial trial, violates the Constitution of the United States.

In the summer before the appellant in this case was tried for the instant offenses, he had been tried and convicted in the same county of rape. There had been publicity during his first trial. The appellant filed a motion for change of venue or motion for a continuance prior to the start of the present case which was scheduled to begin several months after the first trial. The trial court continued the trial for approximately four months to allow some time to pass between the first trial and the present trial. The court also stated when it denied the motion for change of venue that there

would be an extensive voir dire of the prospective jurors concerning any possible bias that they might have resulting from pretrial publicity.

In the instant case, 88 prospective jurors were in the venire. Of these 88 people, 21 stated that they had not heard anything about the case. The other 67 prospective jurors were individually questioned in depth by the court about their impartiality. Of the 67, 7 did express reservations about their ability to make an impartial decision, saying that they had been exposed to the facts of the case and that they felt they could not be impartial. The trial court excused all seven of these jurors for cause. The remaining veniremembers stated that they believed they could base their decisions on the evidence presented at trial. A review of the voir dire

examination shows that the trial court did everything possible to determine the effects of the pretrial publicity on the prospective jurors and to eliminate any prejudice to the appellant.

LaFave and Israel's treatise on Criminal Procedure lists several ways a court may overcome pretrial publicity prior to the jury selection: change of venue, a continuance, and extensive examination of the jurors during the jury selection. See LaFave and Israel, 2 Criminal Procedure §22.2 (1984). The trial court in the instant case granted a continuance and conducted a very thorough voir dire concerning the effect of the pretrial publicity on the prospective jurors.

For the appellant to be entitled to a new trial based on pretrial publicity he must show that the

publicity created a "significant possibility of prejudice." Williams v. State, [Ms. 89-191, June 14, 1991], ___ So.2d ___ (Ala.Cr.App. 1991). "The proper way to ascertain whether adverse publicity may have biased the prospective jury is through the voir dire examination." Thomas v. State, 452 So.2d 899, 902 (Ala.Cr.App. 1984); Lopez v. State, 415 So.2d 1204, 1208 (Ala.Cr.App. 1982).

In the instant case the majority of the jurors answered that they could not remember what they had heard about the case, only that they recognized the appellant's name. When an individual juror stated that he or she had remembered hearing specific facts about the case, the court asked what that individual had heard and asked whether he could set aside what he had heard

and try the case on the facts presented at trial.

> " 'Our own cases have stressed the wide discretion granted to the trial court in conducting voir dire in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias. Particularly with respect to pretrial publicity, we think this primary reliance on the judgment of the trial court makes good sense. The judge of that court sits in the locale where the publicity is said to have had its effect, and brings to his evaluation of any such claim his own perception of the depth and extent of news stories that might influence a juror. The trial court, of course, does not impute his own perceptions to the jurors who are being examined, but these perceptions should be of assistance to it in deciding how detailed an inquiry to make of the members of the jury venire."

Parker v. State, [Ms. 89-838, September 20, 1991], ___ So.2d ___, ___ (Ala.Cr.App. 1991), quoting from Mu'Min v. Virginia, ___ U.S. ___, 111

S.Ct. 1899, 1906, 114 L.Ed.2d 493 (1991). (Emphasis added.)

The trial court did not err in denying the appellant's motion for a change of venue.

III.

The appellant also argues that the trial court erred in denying his Batson[1] motion after the jury had been selected. In Batson the Supreme Court of the United States held that prosecutors may not strike black venire members from a black defendant's trial because of their race or "on the assumption that black jurors as a group will be unable to impartially consider the State's case against a defendant." "The United States Supreme Court

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[1]Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

further held that 'once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors.' " Freeman v. State, [Ms. 90-471, August 23, 1991] ___ So.2d ___ (Ala.Cr.App. 1991). The United States Supreme Court in Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), recently expanded the Batson ruling to include white defendants who allege that blacks have been excluded from their jury because of race.

In the instant case the appellant maintains that the prosecutor's reasons for his strikes of black prospective jurors were not race-neutral. The prosecutor used 24 of his 32 strikes to remove blacks from the venire. The appellant's counsel made a Batson

motion and the trial court asked the prosecutor to justify his strikes.

> "We have previously concluded that where a trial court has made no express finding that a prima facie case of discrimination has been established but nonetheless requires a prosecutor to explain its peremptory challenges, this court will consider such a finding to be implied and will proceed directly to evaluate the prosecution's explanation."

Sims v. State, [Ms. 89-342, June 14, 1991] ___ So.2d ___, ___ (Ala.Cr.App. 1991).

Two black individuals did sit on the jury. However, as we stated in Sims: "The fact that two blacks actually sat on the jury is not proof that no racial discrimination occurred." Sims, ___ So.2d at ___.

The following reasons were given for the prosecutor's strikes of black veniremembers:

Juror number 150 - A previous robbery conviction and failure to register as a felon.

Juror number 106 - A previous conviction for possession of marijuana, a previous conviction for sale of marijuana, a previous conviction for leaving the scene of an accident, and a previous conviction for public intoxication.

Juror number 111 - A previous conviction for assault, traffic violations, and a previous conviction for assault and battery.

Juror number 10 - Prosecuted for welfare fraud.

Juror number 155 - A previous conviction of disorderly conduct and was wearing an earring.

Juror number 43 - A previous DUI conviction and previous harassment and public intoxication convictions.

Juror number 100 - A previous theft conviction.

Juror number 154 - Told the court that he had severe concentration problems and that he felt he would be unable to give the case the attention it deserved.

Juror number 137 - Knew the defendant's family--they went to the same church.

Juror number 71 - Knew Mr. Wagstaff.[2]

Juror number 134 - Indicated during the voir dire that the appellant might be guilty of some of the charges but not of others.

Juror number 142 - He and his wife had discussed the case and at one point in questioning he said that he was not sure he could be impartial.

Juror number 117 - Said that the appellant was a friend of her nephew's and that she would feel uncomfortable sitting on the jury.

Juror number 151 - Not on the original juror list, but a review of criminal records showed that an individual with the same name and who was

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[2]The prosecution asked the court to question the jury about any possible relatrionship with Mr. Wagstaff. Mr. Wagstaff was known to be active in victim's rights and was seen in the courtroom prior to the jury selection.

about the same age had a conviction for fraud and for receiving stolen property. Also indicated that she knew Mr. Wagstaff.

Juror number 9 - Worked at County Market, where the district attorney had prosecuted an employee several weeks earlier who was found not guilty. Also appeared to be very responsive to questions made by the defense. Also repeated "Amen" after the court quoted the Bible.

Juror number 72 - Answered the question posed about eyesight. Said she had not had eyes checked in over 2 years. Prosecutor felt this would affect the case because there were volumes of scientific information that the jury would have to look at. Answered questions very slowly and wore a button which said, "We care."

Juror number 67 - Knew Mr. Wagstaff and had a problem with child at home.

Juror number 124 - Said he couldn't try the case on a "clean slate" and appeared to have difficulty understanding the questions asked during voir dire.

Juror number 149 - Was an ordained minister who was involved in prison ministry. Prosecutor felt she might identify with inmates. Also, when asked about guilt or innocence she answered in a different tone of voice, as if she was not being completely truthful.

Juror number 82 - Was a special education teacher. Appeared to be hostile when answering questions about pretrial publicity.

Juror number 132 - Her responses to questions concerning pretrial publicity indicated that she did not understand what was being asked. The prosecutor stated that he could not understand her and was concerned about her ability to understand the extensive evidence that would be presented. Also had several traffic offenses. Appeared to be very disinterested in the case.

Juror number 23 - Indicated that she had heard that the residents of the area where the rapes had occurred were scared to be there during that time and had "gone crazy." Prosecutor stated that he felt she had overreacted and that he was concerned about characterization of the residents. She also was

inconsistent with answers to questions asked during the voir dire.

Juror number 89 - Prosecutor knew his son. Juror responded that he had been a member of civil rights organizations. Was also 78 years old and felt he would be unable to follow the case. Also had difficulty with his eyesight.

Juror number 75 - Was hesitant in answering questions; had difficulty in speaking and was 69 years old and the prosecutor felt he could not give the attention which would be required for the extensive evidence.

As the Alabama Supreme Court recently noted in Ex parte Bird, [Ms. 89-1061, June 14, 1991] ___ So.2d ___, ___(Ala. 1991), "A history of discriminatory strikes is relevant in assessing the strength of the defendant's prima facie case." The Montgomery County District Attorney's Office does have a history of Batson violations. See Ex parte Bird and the cases cited therein. However, after a

careful review of the reasons given by the prosecution for striking both black prospective jurors and white prospective jurors, we conclude that the strikes of black veniremembers were race-neutral. " 'An appellate court may reverse the trial court's determination that the prosecutor's peremptory challenges were not motivated by intentional discrimination only if that determination is "'"clearly erroneous."'" Gatson v. State, [Ms. 89-431, March 29, 1991] ___ So.2d ___, ___ (Ala.Cr.App. 1991), quoting from Mitchell v. State, 579 So.2d 45, 50 (Ala.Cr.App. 1991). The prosecutor must articulate reasons which are related to the case. Williams v. State, 548 So.2d 501 (Ala.Cr.App. 1988), cert. denied, 489 U.S. 1028, 109 S.Ct. 1159, 103 L.Ed.2d 218 (1989).

The strikes of the prospective jurors who had prior convictions were race-neutral. Jackson v. State, 549 So.2d 616 (Ala.Cr.App. 1989); Ward v. State, 539 So.2d 407 (Ala.Cr.App. 1988). Those jurors who indicated that they had a preconceived view of the case that might affect their verdict were also correctly struck from the jury. Such a preconception supplies a valid race-neutral reason for a strike, which may rise to the level of a strike for cause. Weeks v. State, 568 So.2d 864 (Ala.Cr.App. 1989), cert. denied, ___ U.S. ___, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990). A veniremember's indication that service on the jury would be a hardship is a valid race-neutral reason for striking that veniremember. Harvey v. State, 579 So.2d 22 (Ala.Cr.App. 1990). "The fact that a veniremember appears hostile or

impatient is a valid reason for striking that juror." Mitchell, 579 So.2d at 47. The fact that a veniremember shows dissatisfaction with police is a valid race-neutral reason. Powell v. State, 548 So.2d 590 (Ala.Cr.App. 1988), aff'd, 548 So.2d 605 (Ala. 1989). The fact that an individual may not be able to keep track of the proceedings because of mental or physical impairment is a valid race-neutral reason for striking that juror. Nesbitt v. State, 531 So.2d 37 (Ala.Cr.App. 1987). The fact that a veniremember knew one of the lawyers involved in the case is a valid race-neutral reason for striking that juror. Strong v. State, 538 So.2d 815 (Ala.Cr.App. 1988). The fact that juror knew the defendant is a race-neutral reason for striking that juror. Harris v. State, 545 So.2d 146

(Ala.Cr.App. 1988). Race-neutral reasons must be based on the facts of the case.

We cannot say after a careful review of the record that there is any evidence of "disparate treatment" in the striking of black members of the venire and the striking of the white members of the venire. Sims, supra. The record reflects that two white jurors were struck for the same reason that the prosecution stated that he struck prospective black jurors number 89 and 75, i.e., the inability, primarily because of their ages, to comprehend the extensive evidence presented. Also a white juror was struck for the same reason the prosecution gave for striking prospective black jurors number 67 and 71, i.e., that the juror knew Mr. Wagstaff. One of the reasons given for

striking juror number 149 was that she was involved in prison ministry. Prospective white juror number 153 was struck because her husband was a retired minister. Furthermore, there is no evidence that the prosecutor did not engage the black members of the venire in a meaningful voir dire.

While we do believe that some of the reasons standing alone, such as age, would be suspect, they were accompanied by legitimate race-neutral reasons, and therefore, the strikes were valid. See Battle v. State, 574 So.2d 943 (Ala.Cr.App. 1990).

> " 'A finding of discrimination, or a finding of no discrimination, is a finding of fact. Anderson v. Bessemer City, 470 U.S. 564, 573 [,105 S.Ct. 1504, 1511, 84 L.Ed.2d 518] ... (1985). In a Batson context, the Supreme Court observed that because the trial judge's findings "largely will turn on evaluation of credibility, a reviewing court ordinarily

> should give those findings great deference." Batson, 476 U.S. at 98, n. 21 [106 S.Ct. at 1724 n.21] .... "[F]indings of fact shall not be set aside unless clearly erroneous, and regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." Anderson, 470 U.S. at 573 [105 S.Ct. at 1511] ..., quoting F.R.C.P. 52(a).'"

Owens v. State, 531 So.2d 22, 23 (Ala.Cr.App. 1987). (Emphasis added.) See also Scales v. State, 539 So.2d 1074 (Ala. 1988).

As the United States Supreme Court recently stated in Hernandez v. New York, 114 U.S. 395, 111 S.Ct. 1859, 1868, 114 L.Ed.2d 395 (1991): "In Batson, we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." The trial court's ruling was

not "clearly erroneous." No reversible error occurred here.

The appellant further contends that the trial court erred in not allowing him to cross-examine the prosecutor concerning the reasons he gave for striking the black veniremembers. However, the record reflects that defense counsel never asked to cross-examine the prosecutor when the prosecutor was testifying as to his reasons. As Judge Tyson recently stated in Smith v. State, [Ms. 89-533, September 20, 1991], ___ So.2d ___ (Ala.Cr.App. 1991):

> "Neither Batson nor Branch mandates that a defendant be given the opportunity to cross-examine jurors or other witnesses in order to establish that the State's reasons are based on sham or pretext. Although the list of evidence set out in Branch is not all-inclusive, our reading of the types of evidence allowed to show sham or pretext indicates that Branch

> does not encompass the cross-examination of jurors or allow a defendant to go behind a prosecutor's information to determine if such information was true. A trial court's Batson findings largely turn on an evaluation of credibility. A prosecutor may strike from mistake as long as the assumptions involved are based on an honest belief and are racially neutral."

Smith, ___ So.2d at ___. See also Jackson v. State, [Ms. 90-973, September 20, 1991], ___ So.2d ___ (Ala.Cr.App. 1991).

IV.

The appellant next contends that the trial court erred in allowing DNA (deoxyribonucleic acid)[3] evidence

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[3]"DNA 'is an organic substance found in the nucleus of a cell. It provides the genetic code which determines a person's characteristics.' Caldwell v. State, 260 Ga. 278, 393 S.E.2d 436, 437 n. 1 (1990)." United States v. Two Bulls, 918 F.2d 56, 57 n. 1 (8th Cir. 1990).

to be received into evidence. DNA profiling is the complex process of matching genetic codes. The Alabama Supreme Court described the procedure for evaluating DNA as follows:

> " 'Three commercial laboratories in the United States currently perform DNA analysis: Cellmark..., Lifecodes Corporation,[4] and Cetus Corporation. Both Cellmark and Lifecodes employ restriction fragment length polymorphism (RFLP) analysis in their DNA testing. RFLP analysis involves the following steps:
>
> "'(1) Extraction: DNA is removed from the specimen and "washed" with an organic solvent.
>
> "'(2) Fragmentation: the extracted DNA chain is then cut into fragments at specific sites by mixing it with a restriction enzyme.

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[4]Lifecodes performed the DNA testing in the instant case.

"'(3) Gel electrophoresis: the DNA is placed in a gel to which an electric current is applied, causing separation of the fragments into bands according to their length.

"'(4) Southern [transfer]: the DNA bands are transferred to a nylon membrane while retaining the same positions they previously occupied on the gel. The double-stranded bands are then treated with a chemical that causes them to separate into single strands.

"'(5) Hybridization: genetic probes (DNA clones) are applied, which bind to a specific, complementary DNA sequence on the membrane; the excess probe is then washed off.

" '(6) Autoradiography (or "autorads"): the membrane is exposed to an ex-ray film and developed so that the DNA banding patterns and their lengths can be visualized. Finally, the autoradiography is interpreted by comparing

> the DNA print to another DNA sample to determine if they match based on band length.' "

Ex parte Perry, [Ms. 89-1534, April 19, 1991], ___So.2d___ (Ala. 1991). See also Comment, DNA Identification Tests and the Courts, 63 Wash. L.Rev. 903 (1988).

Our Supreme Court in Perry, recognizing the "possibility of error in the interpretation and performance of [DNA] test[ing]," adopted the following three-pronged test, which must be met before DNA test results may be received into evidence.

> "I. Is there a theory, generally accepted in the scientific community, that supports the conclusion that DNA forensic testing can produce reliable results?
>
> "II. Are there current techniques that are capable of producing reliable results in DNA identification and that are generally accepted in the scientific community?

> "III. In this particular case, did the testing laboratory perform generally accepted scientific techniques without error in the performance or interpretation of the tests?"

Perry, ___ So.2d ___. Prior to the admission of DNA testimony into evidence, a hearing outside the presence of the jury must be held to determine if the test has been met. Perry.

1. The Alabama Supreme Court held in Perry that "there is a theory, generally accepted in the scientific community, that supports the conclusion that DNA forensic testing can produce reliable results." Perry, ___ So.2d at ___, and cases cited therein. As the New York Supreme Court noted in People v. Castro, 144 Misc.2d 956, 545 N.Y.S.2d 985 (Sup.Ct. 1989):

> " 'There is nothing controversial about the theory underlying DNA typing.

> Indeed, this theory is so well accepted that its accuracy is unlikely even to be raised as an issue in hearings on the admissibility of the new tests.... the theory has been repeatedly put to the test and has successfully predicted subsequent observations....' Thompson and Ford, DNA Typing: Acceptance and Weight of the New Genetic Identification Tests, 75 Virginia Law Review 45 at 60-61 (1989)."

Castro, 545 N.Y.S.2d at 989. Thus, the first prong of the test has been met.

2. Our Supreme Court also held in Perry that there are "current techniques that are capable of producing reliable results in DNA identification ... that are generally accepted in the scientific community." Perry, ___So.2d at ___. Thus the second prong of the test has been met.

3. Our main focus becomes the answer to the third prong. In Perry the Supreme Court states:

> "In this particular case, did the testing laboratory perform generally accepted scientific techniques without error in the performance or interpretation of the tests.
>
> In order to answer this question, we must make two inquiries. First, were the techniques used by the testing laboratory generally accepted in the scientific community? Second, was there error in the performance or interpretation of the tests?"

Perry, ___ So.2d at ___.

In the instant case, Dr. Kevin McElfresh, assistant director of forensics at Lifecodes, testified concerning the DNA testing done on the blood taken from the appellant and the blood recovered from the semen samples taken from the rape victims. Dr. McElfresh, testified about the procedures that Lifecodes uses when testing DNA samples. The state introduced the cases of People v. Wesley, 140 Misc. 2d 306, 533 N.Y.S.2d 643 (Sup.Ct. 1988), and Andrews v.

State, 533 So.2d 841 (Fla. App. 1988), review denied, 542 So.2d 1332 (Fla. 1989) to show the procedures used by Lifecodes. Not only were those cases introduced, but Dr. McElfresh testified in depth about the procedures followed by Lifecodes:

> "Q [Prosecutor] - Do you at Lifecodes then follow a particular protocol?
>
> "A [Dr. McElfresh] - Yes, sir, we have a very defined precise protocol.
>
> "Q - Have you described some of that for us in the course of what you have already said?
>
> "A - Yes. I have described the protocol, the eight steps, the seven steps that we have looked at and the parts of the actual test that I have shown you are the results of following that protocol.
>
> "Q - At Lifecodes do you follow that protocol in each and every DNA test procedure that you conduct?
>
> "A - Yes, sir.
>
> "Q - Was that followed in all of the instances of both known

and unknown samples in the Yelder cases that we are here about?

"A - Yes, sir.

"Q - You talked about the Southern papers, is there more you can add about the findings of Ed Southern in regard to what we have described?

"A - What I would add is that with respect to the Southern Transfer Technology, that technology is used in laboratories throughout the world.

"....

"Q - Doctor McElfresh, you mentioned just a moment ago that it would be the same whether it's done at Lifecodes or some other laboratory; are there other labs that use similar procedures to those at Lifecodes?

"A - The procedures used at Lifecodes are used in virtually thousands of labs. The differences are the probes that are used and the source of samples.

"Q - Have you ever cross-checked the work done at Lifecodes with that from other labs?

"A - Well, with respect to forensics in my laboratory, there is one other company in the United States that does a very similar type of testing, Cell-Mark Diagnostics. And in a specific case, the attorneys from Dayton, Ohio, brought samples to my laboratory after they had already been taken to Cell-Mark. They gave us -- we took our part of the samples, Cell-Mark had already taken the very same sample, you could see where they cut part of the samples out and left their initials as part of the forensic procedure.

"We then proceeded to do our test, as Cell-Mark did their test. And at trial, we had both come to the same answer, independently. In addition, --

"Q - In other words, they agreed with each other?

"A - Yes, sir, exactly. In addition, we have participated now in three separate blind trial proficiency tests administered by the State of California.

In the first test, we were sent 22 samples; we were able to get DNA from 16 of those samples that were real trauma samples taken from car wrecks, other things, similar to that where the source of the sample

is known. So they sent us the samples coded. We had no idea what the source of the sample was. Our job is to isolate the DNA, and match it or not match it. From some of those samples, we got nothing. From the rest of the samples, 16 to be precise in the first case, we were able to match 11 of those samples. The rest were non-matches. And when we returned those results to the San Bernardino County Sheriff's Office, we were exactly correct. We made no mistake.

In the second case of proficiency testing, 50 samples were sent to us. 32, were able to isolate DNA from, we made 21 matches. The rest were non-matches, and we were exactly correct.

"And we just received from the State of California this last fall, another 50 samples. In this case, we were able to make 47 DNA prints from those samples, we matched -- again it was 32, I believe, and the bottom line is that we were exactly correct, we made no mistakes.

"Q - In any of your experiments, have you ever reached a false conclusion as to identity?

"A - No, sir.

"Q - Are you aware of any case in which DNA printing has led to a false conclusion, to identity, ever?

"A - No, sir, I'm not.

"Q _ And is your use of DNA printing to establish identity supported by publications?

"A - Yes, sir, we have an extensive publication list. The last publication appeared in the February 1989 American Journal of Human Genetics, that contained the results of our population statistical studies, based on this technology, and as such was accepted by peer review scientific journals.

"Q - Are there other controls that you use to monitor your test procedures and so forth?

"A - In addition to the gel controls that I talked about, in each sample that we run, we run a known sample of human DNA, cut with our particular pair of restriction enzyme scissors. In this case it is known as PST-1. We run a known human sample on every job that we run. We know exactly what the characteristics of that sample are, we know what the pattern looks like, we see it day in and day out, hundreds of thousands of times. And

therefore, if something were to go wrong in the final analysis, no matter what happened before, we would see in that final result something that would tell us that things had gone wrong, and would tell us not to use those results as part of the test.

"....

"Q - Doctor McElfresh, I think you covered this in the last question I asked you to some extent, but can you describe for the court what processes and procedures are used to ensure that there's no contamination or mistake of any type made in the execution of the eight steps that you have just described?

"A - All right. To begin with, a very defined precise chain of custody is set up at Lifecodes. Each sample is given its own specific number with which it is tracked by, and its whereabouts maintained. So we have a precise way of identifying all the samples numerically.

"We have a very precise protocol, as I indicated, in which the steps to ensure the quality of the test are outlined. All the reagents, including the agarose and the other things we purchase for use in our laboratory are

tested first by our quality control labs to ensure that they in fact do precisely what they are supposed to do. We purchase only materials for our laboratory that come with their own quality control standard already done. They submit a quality control standard and the results of their test to us. We in turn duplicate them before we release any reagents to the laboratory.

" ....

"Q - Have your protocols and procedures and the actual facility where those protocols are carried out been examined by outside experts in the past?

"....

"A - Yes, sir, our laboratory is open to scientists who visit for a number of reasons.... Our facilities have been reviewed by specifically Doctor Kenneth Kidd from Yale University, and Doctor David Houseman from MIT...."

The record clearly establishes that the third prong of the Perry test has been met. Thus, evidence of the DNA

matching was correctly received into evidence.

The appellant also contends that the trial court erred in allowing Dr. McElfresh to state "DNA population frequency statistics." "Determination of the probability of specimen match and estimation of population allele frequency distributions are two keys of DNA profiling requiring probabilistic and statistical analyses." Lorne T. Kirby, DNA Fingerprinting 149 (1990). In the instant case defense counsel, relying on a Minnesota case, objected to the population frequency evidence, stating that it was not admissible. The Alabama Supreme Court in Perry stated that population frequency statistics are not per se inadmissible. Prior to the admittance of population frequency statistics, however, the following three-pronged test must be satisfied.

"I. Is there a theory, generally accepted in the scientific community, that supports the conclusion that DNA population frequency statistics, as above defined, can give reliable results?

"II. Are there current techniques that are capable of producing reliable results in DNA population frequency statistics, as above defined, and that are generally accepted in the scientific community?

"III. In this particular case, did the testing laboratory perform generally accepted scientific techniques without error in the actual performance or interpretation of the tests? (The same two inquiries required by this prong in regard to DNA matching evidence are also required for DNA population frequency statistics.)"

Perry, ___ So.2d at ___.

Our Supreme Court in Perry gave the following reasons for distinguishing between evidence of DNA matching and

population frequency statistical evidence. It stated:

> "There are both scientific/mathematical and legal reasons for distinguishing between the admissibility of DNA 'matching' evidence and the admissibility of DNA population frequency statistics. Stated simply, the evidence necessary to show a 'match' does not by itself indicate the frequency with which a given DNA pattern might occur statistically or might occur in a given population; to establish population frequency generally requires data on the relevant populations involved as well as data for the mathematical, statistical analysis."

Perry, ___ So.2d at ___.

The record reflects that Dr. McElfresh was questioned prior to the admission of the population frequency statistics. Dr. McElfresh stated that Lifecodes used the Hardy-Weinberg law and that this procedure for profiling DNA is generally accepted in the scientific community. "The

Hardy-Weinberg law states that in a large random mating population, where no disturbances by outside influences such as mutation, migration, or selection exits, the relative proportions of the different genotypes remain constant from generation to generation." Kirby, supra, at 168; Wesley, supra. (This procedure was validated in Wesley. The introduction of case law is a "common source of information establishing general acceptance." Kirby, supra at 195.) There was testimony in the case to satisfy the three-pronged test articulated in Perry.

However, our inquiry does not end here. Our focus now becomes the answer to the following question posed in Perry: Does the probative value of the evidence outweigh its prejudicial effect? The answer to this question is yes. The facts of the instant case

clearly show that the identity of the assailant was at issue during the trial. None of the three victims could positively identify her attacker. Thus, the DNA evidence became the most compelling evidence in the present case.

The appellant's main contention on appeal concerning the admittance of the population frequency statistics is that there were no statistics for the Montgomery area. There was no objection raised at trial, thus, this objection concerning statistics for the Montgomery area is raised for the first time on appeal and is not correctly before this court. Snowden v. State, 574 So.2d 960 (Ala.Cr.App. 1990). However, the unavailability of statistical information on a certain area of the county should not render population frequency statistics inadmissible. The basic premise of statistics is the

inferences drawn from random samples of population.

> "Basic statistical data are usually derived from samples drawn from large populations. A population is a collection of individuals having stated features in common, such as all Orientals in the United States. A simple random sample is a subset of individuals selected from a population using a random choice mechanism ... which guarantees that all members of the population are equally likely to be chosen....
>
> "The features of interest in a population, such as true average IQ, or the true proportion of a specific allele at a given locus, are called parameters, while statistics are numerical summaries of data such as means or standard deviations. The science of statistics is concerned with inferring information about population parameters based on sample statistics."

Kirby, supra, at 150. See also DNA Identification Tests and the Courts, 63 Wash. L. Rev. 903 (1988).

The appellant next contends that the DNA evidence was incorrectly received into evidence because the chain of custody for the blood samples was not established prior to their admission into evidence. The appellant maintains that the failure of the United Parcel Service (UPS) personnel to testify constituted a break in the chain of custody. This very issue was addressed by Judge Bowen in Snowden. Judge Bowen stated:

> "The lack of testimony by any UPS employee regarding receipt of the package ..., shipment by air, or eventual delivery in New York, while admittedly a bigger gap in the chain of custody, also does not undermine the identity and integrity of the evidence in this case. Requiring each UPS employee who handled the package to testify as to his part in the chain would be not only 'not practical,' see Blanco v. State, 485 So.2d [1217] 1219 [(Ala.Cr.App. 1986)], but also 'not necessary to insure the integrity of the evidence,' id.

> "...Testimony that he received a sealed package containing the very items that ... had [been] placed in the package 'was sufficient to establish the authenticity of the evidence.' "

Snowden, 574 So.2d at 963.

Ms. Lorah McNally of Lifecodes testified that when she received the samples at Lifecodes, the packages were sealed. There was no evidence that the samples had been tampered with by UPS personnel. "Under the circumstances, the trial court could be 'satisfied that in reasonable probability the article has not been changed in any important respect [and] it [could] permit its introduction into evidence.' " Snowden, 574 So.2d at 965.

The failure of the UPS personnel to testify at trial did not render the evidence inadmissible.

V.

The appellant next argues that the trial court erred in allowing evidence of a collateral offense to be received into evidence. Evidence was presented at trial that the appellant had been convicted of raping a Montgomery woman on May 30, 1988. The appellant maintains that evidence of this collateral act was introduced at trial only for the purpose of showing the appellant's propensity to commit the crimes with which he is presently charged.

Generally, evidence of collateral acts is not admissible in the trial of a nonrelated offense. Primm v. State, 473 So.2d 1149 (Ala.Cr.App. 1985); C. Gamble, McElroy's Alabama Evidence §69.01(I) (4th ed. 1991). However, there are several well-recognized

exceptions to this general rule. McElroy's Alabama Evidence §69.01(2 through 14). The most commonly relied on of the exceptions are to prove knowledge, intent, motive, and/or identity. McElroy's §69.01.

When seeking to admit evidence of a collateral offense under the identity exception, the following must be established:

> "All evidence tending to prove a person's guilt of the now-charged crime may be said to identify him as the guilty person. However, the identity exception to the general exclusionary rule is much more specific in that it contemplates the situation where the now-charged crime was committed in a novel and peculiar manner and the state is allowed to show that the accused has committed other similar offenses, in the same novel and peculiar manner, in order to show him the perpetrator of the now-charged crime.
>
> "The identify exception to the general exclusionary rule only becomes applicable when

> the identity of the person who committed the now-charged crime is in issue."

McElroy's Alabama Evidence §69.01(8).

The two major questions which must be answered to determine whether evidence of the collateral offense was correctly received into evidence under the identity exception, are (1) was the crime similar to the now-charged offense? and (2) was the identity of the person who committed the now-charged crime placed at issue? Staten v. State, 547 So.2d 607 (Ala.1989); Ex parte Darby, 516 So.2d 786 (Ala. 1987); Nicks v. State, 521 So.2d 1018 (Ala.Cr.App. 1987), aff'd, 521 So.2d 1035 (Ala.), cert. denied, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 948 (1988); Copeland v. State, 455 So.2d 951 (Ala.Cr.App.), cert. denied, 455 So.2d 956 (Ala. 1984); Bighames v. State, 440 So.2d 1231 (Ala.Cr.App. 1983); Nichols v. State,

422 So.2d 804 (Ala.Cr.App. 1982). The answer to both of the above questions is yes.

In the instant case the collateral crime concerning which evidence was admitted at trial was a rape that occurred eight days after one of the now-charged offenses. The victim was in her house asleep when she was awakened by a hand on her face. The victim and her attacker struggled, and the assailant asked her for money. He became angry when he found out that she had only $35.00 in her purse. They struggled again, and the assailant removed the victim's pajama bottoms and raped her. The assailant had entered the victim's house by way of a bathroom window. A print found on the window ledge of that window was identified as that of the appellant's. The victim's house was located in the same general

area as those of the other rape victims. She also lived in a house surrounded by a privacy fence. The victim also stated that her attacker tried to conceal his identity, wore tennis shoes and blue jeans, and was slim in build. Like the other three victims, this individual did not hear any car drive off after her attack. Furthermore, she could not positively identify her attacker. "The collateral incident proved at trial was sufficiently similar to that which occurred in the instant case." Beavers v. State, 511 So.2d 951 (Ala.Cr.App. 1987).

Not only were the crimes similar but the identity of the assailant was placed at issue in the now-charged offenses. None of the three victims could positively identify their attacker. The admittance of evidence of

the collateral offense under the identity exception was correct.

For the foregoing reasons, the appellant's convictions are due to be, and they are hereby, affirmed.

AFFIRMED.

ALL THE JUDGES CONCUR.

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

JUDICIAL BUILDING, 445 DEXTER AVENUE

MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLIAN
Judges

Clerk's Office
(205)242-4590

Court of Criminal Appeals No. 3 Div. 212
(Montgomery Circuit Court No. 88-2106 thru 88-2112)

Timothy John Yelder vs. State of Alabama
Appellant Appellee

Dear Sir or Madam:

You are hereby notified that on November 15, 1991, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Applications for rehearing overruled.

Rule 39(k) motion denied. No opinion.

/s/ LANE W. MANN
CLERK
COURT OF CRIMINAL
APPEALS

LWM:kl

Hon. Johnny Hardwick
Hon. Marvin Wayne Wiggins
444 South McDonough Street
Montgomery, AL 36104

APPENDIX C

IN THE SUPREME COURT OF ALABAMA
October 8, 1993

1910345 Ex parte Timothy John Yelder
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (RE: Timothy John Yelder v. State). (3/212) (Montgomery: CC 88-2106 thru 88-2112)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

ADAMS, J. - Hornsby, CJ., Maddox, Shores and Ingram, JJ., concur; Houston, J., dissents.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in

said Court. Witness my hand this 8th day of October, 1993.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

ORIGINAL

NO.: 93-1100 (3)

Supreme Court, U.S.
FILED
FEB 28 1994
OFFICE OF THE CLERK

MAR 18 PAGE 15

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA, PETITIONER,

V.

TIMOTHY JOHN YELDER, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, **TIMOTHY JOHN YELDER**, asks leave to file his brief in opposition to the petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in the lower court. Respondent's affidavit in support of this motion is attached hereto.

Timothy Yelder
TIMOTHY JOHN YELDER
Respondent

ADDRESS OF COUNSEL:
JOHNNY HARDWICK, ESQ.
449 South McDonough Street
Montgomery, AL 36104
(205) 265-0117

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been served upon the Hon. James H. Evans, Attorney General, and Hon. Margaret Scholten Childers, Assistant Attorney General, Counsel of Record for Petitioner, Office of the Attorney General, Criminal Appeals Division, Alabama State House, 11 South Union Street Montgomery, AL 36130, via United States Mail, first-class postage prepaid, on this the 27th day of January, 1994.

J. G. Hardwick
JOHNNY HARDWICK, Esq.

14pp

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA, PETITIONER,

V.

TIMOTHY JOHN YELDER, RESPONDENT.

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Timothy John Yelder, being first duly sworn, depose and say that I am the Respondent in the above-entitled case, that in support of my Motion for Leave to Proceed In Forma Pauperis, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ____ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   _____

   _____

   b. If the answer is no, state the date of your last employment and amount of the salary or wages per month which you received.
   1988 was the last year I worked. I am presently serving a life sentence and I have been in prison since 1988.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes ____ No ✓
   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

   _____

   _____

3. Do you own any cash or checking or savings account? Yes___ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No ✓

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Timothy Yelder
TIMOTHY JOHN YELDER
Respondent

Subscribed and sworn to before me this 27th day of January, 1994.

Jo Ly Hardwick
Notary

My Commission expires: 10/13/96

ADDRESS OF COUNSEL:
JOHNNY HARDWICK, ESQ.
449 South McDonough Street
Montgomery, AL 36104
(205) 265-0117

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been served upon the Hon. James H. Evans, Attorney General, and Hon. Margaret Scholten Childers, Assistant Attorney General, Counsel of Record for Petitioner, Office of the Attorney General, Criminal Appeals Division, Alabama State House, 11 South Union Street Montgomery, AL 36130, via United States Mail, first-class postage prepaid, on this the 27th day of January, 1994.

Jo Ly Hardwick
JOHNNY HARDWICK, Esq.

NO. 93-1109

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

PETITIONER,

V.

TIMOTHY JOHN YELDER,

RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION
TO THE PETITION
FOR WRIT OF CERTIORARI

Of Counsel:

JOHNNY HARDWICK

449 South McDonough Street
Montgomery, AL 36104
(205) 265-0117

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PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

STATEMENT OF THE CASE

The Respondent accepts the Petitioner's Statement of the Case except the statements made on pure speculation as to the prosecutor's subjective reasons for asking certain questions on voir dire examination which was conducted by the trial Judge.

ARGUMENT

The judgment of the Alabama Supreme Court is not in conflict with this court's decisions in Batson v. Kentucky, 476 U. S. 79 (1986), and Hernandez v. New York, 111 S. Ct. 1854 (1991)

The Alabama Supreme Court in the instant case held "that the prosecution purposefully discriminated against the Respondent in the jury selection process through its use of peremptory challenges" .

The opinion of the Court is more succinct than anything Yelder might write, and therefore Yelder quotes the following reasoning for the holding of the Court.

> "In many respects, this case bears a remarkable resemblance to Ex parte Bird, 594 So. 2d 676 (Ala. 1991). First, the statistics are strikingly similar. In Bird, although "black veniremembers comprised 36% of the venire," the percentage of black jurors actually seated on the jury represented "only 8% of the trial jury." Id. at 680. The State, in that case, "used 85% of (its) peremptory challenges, that is, 17 of 20 strikes, to eliminate 89% of the black veniremembers." Id. at 681. In this case, the jury pool contained a total of 86 veniremembers of which only 27, that is, 31%, were black. The State then used 75% of its peremptory challenges -- 24 of 32 strikes -- to reduce that 31% by another 89%.[1]
>
> As we pointed out in Bird, the sheer weight of statistics such as these raises a strong inference of racial discrimination requiring clear and cogent explanations by the

[1]Ultimately, two black veniremembers were seated on the jury.

> State in rebuttal. Id. at 680-81. Instead of such explanations, however, those proffered in this case virtually parallel the whimsical, ad hoc excuses we rejected in Bird -- in particular, the State's explanations for its challenges of veniremember number 26 (same name as someone allegedly prosecuted by the district attorney's office), id. at 682-83; veniremember number 76 (excluded because of prosecutrix's "gut reaction"), id. at 684; veniremember number 96 (excluded because of "body language"), id. at 685; and veniremember number 33 (alleged "communication difficulty"). Id.
>
> Moreover, the "articulation" or "communication" difficulties cited by the State as reasons for its challenges of veniremember number 75 and number 132 are not supported by the record....
>
> Obviously, the State's allegations of communication deficiencies on the part of these veniremembers are not only wholly without support in the record, but
> are directly refuted by it. Perhaps most cogently, the record, which reveals a series of clear and unequivocal responses given by veniremember number 132, forcefully contradicts the prosecution's assertions that he "couldn't understand a word she said, "because of "the way she put her sentences together." We are compelled to conclude that the explanations advanced by the State for its challenges of those veniremembers represent no more than a pretext for racial discrimination.
>
> We regret that the conduct of the prosecution has, because of actions taken on the basis of race, once again necessitated a retrial, thus creating an additional strain on the judicial and economic resources of this state...."

The Alabama Supreme Court "did not commit clear error" in determining that the prosecutor violated Batson. The Alabama Supreme Court gave" appropriate weight to the disparate impact "of the prosecutor's conduct.

The Alabama Supreme Court chose not to believe the prosecutor's explanation of its assertion of race neutral reasons for its preemptory strikes, see Hernandez.

The Alabama Supreme Court took "a permissible view of the evidonce in [not] crediting the prosecutor's explanation (Hernandez v. New York, 111 S. Ct. 1859 (1991).

in the present case before this Honorable Court, the judgment of the Alabama Supreme Court finding that the Respondent's constitutional rights were violated by the State is not clearly erroneous.

To overruled the Alabama Supreme Court "would pervert the concept of federalism", Bose Corp v. Consumers Union of United States, Inc., 466 U. S. 485, 104 S. Ct. 1949, 80 L.Ed 2d 502 (1984) Hernandez v. New York, 111 S. Ct. 1859 (1991).

This court should "discern no clear error in the Alabama Supreme Court's determination that the prosecutor discriminated on the basis of race. As was stated in Hernandez, supra, "where there are two permissible views of the evidence, the choice between them cannot be clearly erroneous". Anderson v. Bessemer City, 470 U. S. 564, 574, 105, S. Ct. 1504, 1511, 88 (2d, 2d 518 (1985).

Respondent is a member of a cognizable racial group, Batson, 476 U. S. at 99, citing Castaneda v. Partida, 430 U. S. 482 (1977), and the prosecution exercised its peremptory challenges to remove from the venire nearly all members of Respondent's race. The prosecution used twenty-four (24) of its thirty-two (32) strikes to remove blacks from the venire. (Vol. I, TR-196) It is recognized that removing all or almost all blacks, or using all or almost all strikes against Blacks, may raise a prima facie case of discrimination. Additionally, the striking of a disproportionate number of blacks so as to render minority representation on the jury impotent may constitute a prima facie case of discrimination. Batson, supra.

Furthermore, this is a case involving a black man accused of raping several white women, which makes it susceptible to racial discrimination. These factors, coupled with

the notion that peremptory challenges constitute a jury selection practice which permit "those to discriminate who are of a mind to discriminate", Batson, 476 U. S. at 96 (quoting Avery v. Georgia, 345 U. S. 559, 562 (1953), created an inference that the striking of all but two of the black veniremen was on account of race.

Under these circumstances, Alabama's Supreme Court is to be commended for its decision.

CONCLUSION

The Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Timothy Yelder IV

TIMOTHY YELDER
RESPONDENT

JOHNNY HARDWICK, Esq.
ATTORNEY FOR DEFENDANT

ADDRESS OF COUNSEL:
449 SOUTH MCDONOUGH STREET
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LAW OFFICE OF
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JOHNNY HARDWICK J D
ATTORNEY AT LAW

MARVIN W WIGGINS LL M
ATTORNEY AT LAW

TELEPHONE (205) 265 0117
FACSIMILE (205) 265 4780

February 7, 1994

Mr. Frank Lorson
Chief Deputy Clerk
Supreme Court of the
United States
#1 First Street, N. E.
Washington, D. C. 20543

RE: STATE OF ALABAMA VS. TIMOTHY YELDER
PETITION FOR CERTIORARI
NO.: 93-1109

Dear Mr. Lorson:

This letter is to respectfully request a thirty- (30) day extension of time to file a "Brief In Opposition to the Petition for Certioran" in the above-styled matter.

The extension of time is requested for the following reasons:

1. The Respondent, Timothy Yelder is currently incarcerated in a correctional facility in St. Clair, Alabama, which is approximately a 300 mile round-trip commute for Respondent's attorney;

2. I am assisting Mr. Yelder in preparing his response;

3. I have not been admitted to practice for the Supreme Court and am in the process of submitting my application;

4. There is no objection from the attorney for the Petitioner;

Please find the enclosed MOTION TO PROCEED IN FORMA PAUPERIS and THE AFFIDAVIT IN SUPPORT THEREOF on behalf of the Respondent. I will forward my application for admission to the Bar of the Supreme Court under separate cover.

Your immediate attention to this matter will be greatly appreciated.

Sincerely,

JOHNNY HARDWICK, Esq.

cc: Hon. Margaret S Chiders
Attorney for Petitioner

NO. 93-1109

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

PETITIONER

VS.

TIMOTHY JOHN YELDER,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

CERTIFICATE OF SERVICE

I, Margaret Scholten Childers, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served three copies of the Petition for a Writ of Certiorari and three copies of the Appendix to said petition on all parties required to be served, to-wit: the attorney for Respondent Timothy John Yelder, as follows:

Johnny Hardwick, Esq.
449 South McDonough Street
Montgomery, Alabama 36104

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on this 6th day of January, 1994, by depositing the same in the United States mail, properly addressed and first class postage prepaid. Mr. Hardwick's telephone number is (205) 265-0117.

Margaret Scholten Childers

MARGARET SCHOLTEN CHILDERS
ASSISTANT ATTORNEY GENERAL

ATTORNEY FOR THE PETITIONER

ADDRESS OF COUNSEL:

Office of the Attorney General
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11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

5076CR